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April 20, 2022

JOINT STATUS REPORT

Via Electronic Court Filing System

Hon. Barbara Moses
United States Courthouse
500 Pearl Street
New York, New York 10007

**Re: *Poly-America, L.P. v. API Industries Inc.*, Cause No: 21-CV-8195 (JSR) (BCM),
pending in United States District Court, Southern District of New York**

Dear Judge Moses:

Pursuant the Court's March 28, 2022, Order Regarding General Pretrial Management and Related Matters (the "Order"), I am writing on behalf of both Poly-America and API Industries, Inc. ("API") (collectively with Poly-America, the "Parties") to provide a Joint Status Report.

I. Status of Discovery.

On March 28, 2022, the Court ordered Poly-America to produce non-privileged documents responsive to API's Requests for Production Nos. 2, 3, and 4 (with certain limitations). With one exception, Poly-America has produced responsive documents to API or otherwise indicated that no responsive documents exist. Poly-America has also produced a privilege log.

On April 19, 2022, Poly-America served Supplemental Objections and Responses to API's Requests for Admissions (the "Responses") and admitted that the Orange Drawstring Mark has not acquired secondary meaning in commerce. In light of this admission, Poly-America is currently withholding certain highly confidential financial records potentially responsive to API's Request for Production No. 3(d). Poly-America believes API's requests for financial records would only be relevant to the issue of secondary meaning, and Poly-America believes documents relating to secondary meaning are no longer relevant to this case in view of its admission that the Orange Drawstring Mark has not acquired secondary meaning.

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API believes financial records concerning Poly-America's sales of trashbags with orange drawstrings by all of the retailers to which it sells such products are relevant to the issue of whether the Orange Drawstring Mark is generic. *See, e.g., Milwaukee Electric Tool v. Freud America*, 2019 USPQ2d 16 (TTAB 2019); *Poly-America, L.P. v. Illinois Tool Works Inc.*, 124 USPQ2d 1508, 1520 n. 48 (TTAB 2017). In addition, API believes such documents are relevant with respect to the issue of whether the orange drawstring is capable of acquiring secondary meaning.

The parties are engaged in good-faith efforts to resolve this sole remaining issue and are currently exploring whether further assurances or stipulations by Poly-America could render this issue moot.

II. Status of Settlement.

For reasons set forth in prior filings with this Court, specifically the Parties' March 15, 2022, Joint Letter-Motion to Cancel Settlement Conference, the Parties still believe that settlement of Poly-America's appeal is not a legally viable option. Nevertheless, the Parties are engaged in good faith discussions regarding resolution of API's declaratory judgment counterclaims—especially in view of Poly-America's admission that the Orange Drawstring Mark has not acquired secondary meaning.

III. Proposed Deadlines.

The Parties propose the following amended deadlines to the Court's January 21, 2022, Civil Case Management Plan and Scheduling Order:

1. All fact discovery to be completed no later than June 20, 2022.
2. Disclosure of expert reports for the party bearing the burden of proof to be completed no later than June 30, 2022.
3. Disclosure of expert reports on responsive issues to be completed no later than July 30, 2022.
4. All expert discovery to be completed no later than August 30, 2022.

Sincerely,

/s/ Austin Champion
Austin Champion
Counsel for Poly-America, L.P.

/s/ Efrem Schwalb
Efrem Schwalb
Counsel for API Industries, Inc.